

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

P.W., on behalf of O.W, a minor

Petitioner,

vs

Charleston County School District

Respondent.

IDEA DUE PROCESS HEARING

ORDER

PROCEDURAL HISTORY

The father of the Student, served upon the Charleston County School District a Request for a Due Process Hearing on April 23, 2019. District engaged John J. Fantry Jr., as Local Due Process Hearing Officer (HO) on April 25, 2019. District filed a Response to the father's Request for Due Process Hearing on May 3, 2019. A Resolution Meeting was held on May 9, 2019, with no resulting agreement. A Hearing of this matter was held by the undersigned Local Due Process Hearing Officer on June 27th, 28th, and July 1, 2019.

WITNESSES TESTIFYING

For Petitioner and Respondent: Special Education Coordinator, Occupational Therapist, Special Education Teacher and Case Manager Murray-LaSaine Elementary School, School Psychologist, Autism Itinerant Teacher, Speech Language Pathologist at Murray-LaSaine, Principal at Murray-LaSaine, Student's Mother, Special Education Teacher Ashley River Creative Arts Elementary School, School Nurse at Murray-LaSaine Elementary School, ABA Registered Behavioral Technician, BCBA board certified Behavior Analyst Consultant, and Beverly Holt-Pilkey, Executive Director Department of Exceptional Children Charleston County School District.

ADMINISTRATIVE RULINGS

1. Hearing Officer introduced into the record Petitioner's Request for Due Process Hearing, dated April 23, 2019, as HO Exhibit 1 and Respondent's Answer to the Due Process Hearing Request, dated May 3, 2019, as HO Exhibit 2. All other Hearing Exhibits are to be entered into the record when Petitioner or Respondent first wishes to use the document for examination of a witness.
2. As requested by Petitioner, the Hearing was open to the public, pursuant to IDEA §300.512(c).
3. Respondent objected to a witness for Petitioner in the proceeding. I sustained the objection on the ground that Petitioner failed to identify the person as a potential witness five days prior to this Hearing (IDEA § 300.512(b)(1)) and her failure to respond to Respondent's Subpoena Duces Tecum for records. Petitioner noted his Exception to this Ruling.
4. Petitioner and Respondent agreed that witnesses will not be sequestered before testifying.
5. Petitioner and Respondent agreed that the testimony of the Autism Itinerant Teacher could be taken through a telephone conference call.
6. Petitioner objected to Mr. Reagle's question to the special education coordinator about what the individualized education program (IEP) (Respondent's Exhibit 2) provided for the Student in terms of sensory-related modifications and accommodations. Petitioner objected on the grounds that the witness doesn't have the knowledge or expertise as far as this question that she's answering as if it's a fact. Additionally, I think opinions

should be referred to as opinions, not as a matter of fact. HO finds the special education coordinator is qualified as a certified educator, who has developed IEPs, including IEPs for the Student, and may testify to what the document means. Objection denied.

7. The HO takes Judicial Notice that IEPs and prior written notices for the Student were introduced with dates of March 15, 2019; April 15, 2019; May 13, 2019; and June 5, 2019. Petitioner acknowledges that he and/or the Student's mother attended these meetings. Respondent District asserts the June 5, 2019, IEP is the IEP the District plans to put implement. The June 5, 2019, IEP is the updated version of the IEP which incorporated the Parents' requested improvements. HO rules that, for the purpose of determining whether the District offered the Student a FAPE, he will use the IEP dated June 5, 2019. Respondent objected asserting "We didn't agree in April of what was being proposed. That was why we filed the due process. And then they told us we had to do the May one because his annual IEP review was due. So, they forced the annual IEP to be done even though we had already said we didn't agree in April." HO ruled he would note in the record and treat, as fact, that Parents objected to all versions of the IEP for the deficiency in a FAPE raised in Petitioner's Due Process Request or during these proceedings. Petitioner has noted his Exception to this Ruling.
8. Respondent objected to the father's question to the school nurse for Murray-LaSainee Elementary School, "She was trying to keep you up to date on what was happening?" on the grounds witness cannot testify as to what the mother's motivations were for communicating medical information to her. Objection sustained.

9. Petitioner objected to Mr. Reagle's question to the school nurse, "Did you ask the [Parents] if you could speak with any of [Student's] doctors in developing this order or providing care for [the Student]?" On the grounds that statement is an opinion on what the Student's mother wanted to do. The HO denies the Objection and the testimony is not removed from the record.
10. The HO raised a question regarding the entry of a medical record from Coastal Pediatrics. Witness could not identify the document and suggested the document be introduced later if the Student's father chose to testify. Mr. Reagle objected on the grounds that the Student's father was not listed as a witness five days before the Hearing. Objection sustained.
11. Respondent objected to the father introducing into the record an IEP and Prior Written Notices from 2016. The Student's father argued it was relevant to the Parents' request for a one-on-one assistant. The HO ruled that the document was prior to Petitioner's challenge and not relevant to the Hearing. Objections sustained.
12. Respondent objected to the father's question to the BCBA, "In your opinion, would it be given his current situation where he is in a gen ed special ed setting with paraprofessional support, would moving him to an autism-only classroom with no general ed or peer interaction be more or less restrictive?" Ms. Blackburn argued that, because there has not been any testimony the Student would not be exposed to general education peers. So, this is a hypothetical situation. HO found witness had experience with IEPs, and has done assessments, but thinks we're talking about evaluation of classroom participation and you've asked for less restrictive area. The BCBA has not reviewed the Student's IEPs.

today in the Hearing and her comments are limited to less restrictive areas in general and not as an opinion on less restrictive areas as pertaining to the IEP proposed for the Student. Objection denied.

13. Petitioner objected to introduction of Respondent's Exhibit 13 on the grounds that "They are comparing my son with a learning disability with typically developing children. I would like to see the information provided with other children with disabilities compared to typically developing children in that this is not a fair representation of my son's abilities as compared to typically developing children." Ms. Blackburn argued that "ultimately what [the Student's father] appears to be seeking is for the Student to be in a classroom with typically developing peers and working on grade level standards. So, this is very relevant to those issues." HO notes that the Measures of Academic Progress (MAP) report was prepared on the Parents' request (Respondent's Exhibit 4 page 671). Objection denied.

ISSUES

1. Did District fail to provide Parents Notice of a plan to adopt a new IEP, which would move the Student from Murray-LaSaine Elementary School to Ashley River Creative Arts Elementary School?
2. Has the District failed to provide the Student a FAPE by refusing Parents' request that the Student have a child-specific assistant?
3. Was the behavioral intervention plan (BIP), developed for the Student during the time he was experiencing medical concerns and having changes to medications, an accurate listing of conduct dangerous to the Student, other children or teachers, or tainted by the effects of the medication?

4. Does the IDEA require a school district to provide services to a child when Parents want him educated at home?
5. Are the goals, curriculum, and modifications expressed in the June 5, 2019, IEP proposed for the Student suitable to meet his needs?

FACTS

1. The Student in November of 2018 was described in his IEP as having a primary disability in the area of Autism Disorder and a secondary disability in the area of speech/language impairment. The Student has annual IEP goals in math, reading, writing, daily living skills, socialization, communication, and speech and language.
2. Starting around the fall of 2018, the Student had some significant behaviors and changes. The Student displayed aggressive behaviors at school, to include banging on table, pushing over furniture, throwing objects, grabbing adults and or peers, hitting adults, and throwing himself on the floor. There was also elopement behavior taking place that sometimes coincided with the aggression. At times, the elopement occurred immediately following an aggressive act, such as flipping over a table and running out of the room. Other incidents of aggression have occurred when the Student was being redirected in an activity or denied something he wanted. There were also incidents of elopement that occurred with no warning, such as jumping up from the lunch table and attempting to run out of the cafeteria. Elopement also has occurred prior to an aggressive act, including the Student leaving an area, running down the hallway, attempting to bite an adult, and grabbing a child walking by. Aggressive behaviors were seen across all settings, occurring in the general education classroom, hallway, lunchroom, and outside area. (Testimony school psychologist). When asked, if the Student was normally an aggressive child, the Student's mother responded, "No. We've never --I mean, up until--he's nine

now. He's been in the school system, you know, quite a few years. He's never had a behavior intervention plan or an FBA before. In fact, you know, we had to request that an FBA be done because we were concerned that it wasn't behavior; that there was something else going on because we've never seen that. . . . The only time we've seen aggression with him is when he's in pain, and the other time that I would say that he might throw what I would term a tantrum is, you know, he doesn't like something, he might, you know, knock papers off or throw a truck or whatever."

3. Parents, in March 2019, requested a functional behavioral assessment (FBA) and BIP and one-on-one support immediately for the Student due to his medical needs. The FBA and the BIP were completed and introduced in the April 5th Meeting.
4. Parents objected to the FBA and BIP, arguing that incidence of pain from the Student's GI medical issues and medication make questionable the incidents reported and the BIP. The Parents' BCBA testified that incidents of pain should not be used in development of a BIP. The special education resource teacher, testified she did not at every single time the Student had an aggressive incident was his medical needs. The school psychologist testified "My professional and personal opinion is that the medications did not skew the behavior." When asked if a child could communicate while in pain, the special education coordinator expressed, through a series of questions and answers with the father, that she has seen students who are capable of communicating with pain if not verbally then by getting students to identify a picture would indicate where he was hurting.

5. Parents objected to the IEP on the grounds that now that the Student's medical issues have settled the autism support classroom is a more restrictive environment than the Montessori room in Murray-LaSaine with a specified one-on-one assistant. The special education coordinator testified, through a series of questions and answers with the father, that the Student's change in placement was not just about behavior. She stated when she observed him in his general education class, he was segregated by himself. He wasn't accessing his peers or the curriculum. He would still need that high level of communication and socio-emotional skill development built in throughout his instructional day and not just as a resource or a pull-out service. He was using primary materials in the Montessori curriculum and those are not grade-appropriate or age-appropriate for where the Student was chronologically. He is still experiencing significant needs related to the reading, writing, math, socio-emotional behavior, daily living skills and socio-emotional.

Would it even have been practical to implement this IEP in a regular education classroom setting such as the Montessori room in Murray-LaSaine? The occupational therapist testified it was difficult for the Student to address his sensory needs in a large class environment. It would be impossible to implement the Student's needs at Murray-LaSaine. the Student is in a more restrictive placement currently. A special education teacher testified "I don't believe [the Student] has the ability to truly participate in a general education environment at this time." The school psychologist testified "I find that when children are working with a one on one adult, it actually isolates them from peer interaction. It also causes dependency that may not always be necessary."

6. Parents objected to the IEP on the grounds that they were not allowed to discuss the content of the IEP. Prior Written Notices were introduced with dates of March 15, 2019; April 15, 2019; May 13, 2019; and June 5, 2019. Petitioner acknowledged that he and/or

the Student's mother attended these meeting. Testimony reflected the Parents' request to delay the March 15, 2019, IEP to complete FBA and BIP was honored. Testimony reflected the FBA and BIP were discussed with the Parents, along with change of placement. Parents requested to stop meeting and to address transportation and implementation at future meeting. The IEP team, honored the Parents' request and did not implement the IEP, the Parents filed the Due Process Hearing Request prior to the May 13, 2019, IEP meeting and annual review. Testimony reflected the May 13, 2019, IEP honored the Parents' request for transportation, ESY, and MAP. The May 13, 2019 IEP meeting stopped when one of the Parents needed to leave for a medical emergency. Another special education teacher's testimony reflected the mother attended the IEP meeting on June 5, 2019, and requested a review of the ESY hours.

7. The Student's stamina for work has changed. Where we were able to work for maybe 5 minutes, he's not able to work beyond, maybe, sometimes five minutes. I saw a difference or decline starting around November-December until the school year's end. The Student's effort improved to some degree in April and May, but not really. One of the special education teachers was not able to implement [the Student's] IEP. One of the other special education teachers at Murray-LaSaine Elementary School testified that towards the very end of May and beginning of June the Student made improvements, in aggressive behaviors. The school nurse testified he was out for a period of time in April ... , but when he came back, things seemed to improve some for a little while and towards the last few weeks of school, it seemed like he was starting to have the similar aggression issues or pain or what have you again there was a stretch probably late April, early May I saw a lot less of him. The Autism Itinerant teacher testified, "The first year I was with him, he was picking up some things and he was a little bit more responsive. This past year, from September, maybe October-ish, there was a significant decline in the ability

to access his education because of behavioral problems.”

8. The mother’s testimony reflects the Parents do not believe the goals, curriculum and modifications expressed in the June 5, 2019, IEP proposed for the Student is suitable to meet his needs. The mother testified, “we had [the Student] in a low incidence classroom before, even though he shouldn’t have been in there because he was not low incidence because he has autism and autism’s not considered part of low incidence. The BCBA, prior to testifying, did not review the June 5, 2019 IEP. The ABA Registered Behavioral Technician, was not qualified to give an opinion on the June 5, 2019, IEP and was asked questions pertaining to the June 5, 2019 IEP. One of the teachers testified, “From the information I’ve seen in the IEP, it seems appropriate.” The occupational therapist testified the IEP would provide meaningful educational benefit to the Student considering all the circumstances.
9. The Student’s mother testified the Parents provided the District with instruction for administering medicines prescribed by the Student’s doctors and a list of the medications (Plaintiff’s Exhibit 10) The school nurse testified she personally administers the medications and developed the Student’s Individual Health Plan (IHP) on November 12, 2018. (Respondent’s Exhibit 8). The Student’s mother provided additional medical instruction on April 3, 2019 (Respondent’s Exhibit 9) The IHP was updated and modified on April 2, 2019 (Respondent’s Exhibit 10). Through a series of question and answers with the father, the Student received medication on April 1, 2019; April 4, 2019; April 11, 2019; and April 7, 2019. In responding to the HO questions, the school nurse testified she had received no instruction from a doctor that the Student should not be in school when taking medication. The school psychologist testified “I believe -- yeah. The behavior plan

that is part of IEP has the medical plan included.”

10. Parent asked District in November of 2018 about medical homebased education for the Student. The mother testified “I guess I also did request -- I was just thinking about it. I mean, I also did offer the ability to have him homebound.” ... “When I first offered that up, they told me that it was between the parent, the provider, and the administrator, but I was also told by the district that it would take too long and so he wouldn't get the support before he was going to be in the hospital. So, we did not go after that avenue because we were told we were not going to get the support anyways.” The District testified “[The mother] has brought up the question about going that route, and it has been shared with you guys that that has to be initiated from the parent level. And had that been initiated, I could have absolutely supported that.”e

LAW

1. IDEA § 300.344. The group of professionals, school staff, and agency representatives who are familiar with the particular student with a disability and who—along with the parent or legal guardian and the student, if appropriate—are responsible for developing, reviewing, and/or revising the student's IEP.
2. The burden of persuasion is upon the person changing the IEP. *Schaffer v. Weast* 546 U.S. 49, 44 IDELR 150 (11-14-2015).
3. While parents have the burden of persuasion under the law, the District must demonstrate that the challenged IEP is “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S.Ct. 988 (2017).
4. District has the burden of compliance with the mainstreaming requirement of IDEA no matter, who brings the matter before the District Court” *Oberti v. Board of Education* 995 F.2d 1204 (3rd Cir. 1993)
5. The Courts have ruled that when ruling upon an IDEA LRE complaint, the court may grant relief based upon the “preponderance of the evidence,” but this does not mean the court is invited to substitute its notion of sound education policy for the Educators, who

have been charged with the task. *Hartman v Loudon County Board of Education* 118 F.3d.996 (1997)

6. The Courts have found that the base floor of opportunity for children with disabilities is mainstreaming but is not required where the child will not receive an educational benefit, where marginal benefits for mainstreaming would be outweighed by benefits which can only be obtained in a separate institutional setting, or the child is a disruptive force in a regular classroom setting. *DeVries v. Fairfax County Sch Board* 887 F.2nd 876 (4th Cir.1989).
7. *Temacola Valley Unified Sch District* 109 LRP 74851 – HO found no predetermination despite draft IEP and pre-meeting discussions where changes made to the draft at suggestions of parents.
8. *Memphhis City Schs* 52 IDELR 275 HO found no predetermination where district considered mom's views re ABAA services but rejected them.
9. *JD by Davis v. Kanawha County Bd of Education* 52 IDELR 230 Where the parent has derailed the IEP process before an IEP could be completed after five IEP Team meetings in the same year in which parents fully participated there was no predetermination.
10. *In Re: Student with a Disability* 51 IDELR 87 If FAPE is provided, questions of methodology are best left to the discretion of professional educators.
11. *JD by Davis v. Kanawha County Bd of Education* 48 IDELR 159 Although parents have a right to meaningful participation in the IEP process, they do not have a right to dominate the process.
12. State Board of Education Regulation 43-241 requires that a licensed physician certify that the student cannot attend school as a result of an accident, illness, or pregnancy, despite the aid of transportation, and that he or she may profit from instruction given in the home or in a hospital. The physician must complete the state's medical homebound instruction form that the local school district provides. The district superintendent, or his or her designee, may or may not then approve the student's participation in a program for medical homebound instruction.

CONCLUSIONS

1. The prior written notice provision of the IDEA requires the document to be delivered prior to implementation of a new IEP. Parents erred in interpreting the regulation to require prior written notice to be delivered before or immediately before the close of

the Team IEP Meeting in which the change are discussed. During the March 15, 2019 meeting the topics to be discussed were a FBA, BIP, and change of placement to Murray-Lasaine Elementary School. Parents objected to the change of placement and asked that the FBA and BIP be updated and implementation of the IEP postponed. The Team took no action to implement the IEP. The prior notice for the April 15, 2019, IEP meeting placed on the agenda the updated FBA and BIP, behavior and medical issue, and change of placement and services. The Parents objected to a change of placement, discussed transportation accommodations, and requested homebound services and further delay in implementing Student's IEP. The Team decided to implement the IEP on 4/23/2019. Student's father filed a Due Process Hearing Request on April 23, 2019. The IEP Team with Parents held a Facilitated IEP Meeting on May 13, 2019. The prior written notice addressed previous topics and added transportation, ESY, and MAP assessments. Parents stopped the meeting. IEP Team with Parents met on June 5, 2019. The prior written notice cited discussion on previous topics and the results of the MAP analysis. Parents objected to the results of the MAP. Based upon testimony and exhibits I find the notices comply with the IDEA notice provision. I conclude the IEP Team, by modifying the IEP to address the FBA, BIP, transportation, and ESY, evidenced the Parents were not denied the ability to meaningfully participate in the IEP process.

2.e I conclude rejection of a "specified one-on-one assistant" for the purpose of tracking the administration of medications, avoiding injuries from elopements at Murray-Lesaine Elementary, and aiding the Student's communication did not deny the Student a FAPE.

(a) The registered nurse at the school, is responsible for administering the Student's medication. She prepared an Emergency Individual Health Plan (IHP) for the Student on November 8, 2018, and updated the IHP on April 12, 2019, in

cooperation with the Student's mother and doctors' instructions. The updated IHP is incorporated into the IEP that is the subject of this hearing. A specific one-on-one assistant is an unnecessary duplication of services already provided by a school nurse.

(b) The IEP provides for increased one-on-one assistance from special education teachers and two assistants in the Autism Support Program at Ashley Rivers Creative Arts. The Autism Support Program has a concentrated, one-on-one assistance curriculum proposing a class size of nine students while the Student's class size at Murray-Lasaine Elementary is twenty-eight students. As planned, the Student would not be without a "one-on-one assistants." Adding an additional person, who is not certified in special education is not necessary.

(c) The addition of another uncertified person would interfere with the Student's educational progress toward the goals provided in his IEP.

(d) A "specific one-on-one assistant" creates the most restrictive environment for a child and should be avoided if other options are available.

3. I have concluded the FBA and BIP utilized by the IEP team for the June 5, 2019, IEP are not flawed on the basis that the behavioral incident tracking data includes events occurring during or in close proximity to administration of medicines or while the Student is in pain. The Student has been on gastrological medications since November 2018 to the present. A board certified behavior analyst (BCBA) consultant, appearing as Petitioner's Witness testified a FBA is inherently flawed when the occurrence data includes incidences of behavior when a child is in pain. The special education teacher and case manager for Murray-Lesaine Elementary, testified not every behavior incident was related to the Student's use of medication for his gastrointestinal issues. The special education coordinator, testified that students with autism are

capable of communicating pain, either verbally or through pictures. The school psychologist, testified the Student taking medication did not skew his FBA. I reject the Parents' BCBA's opinion that any FBA is inherently flawed for tracking behavior events when a child is in pain or taking medication and find persuasive the educator witnesses testimony that a student's pain or the ingestion of medicines in proximity of the behavioral incident can be used to estimate the trigger for a child's negative behavior. concluded the District has not denied the Student a FAPE by not honoring the Parents' request for Homebased Services. Homebased Services are not a specified entitlement under the IDEA Regulations. The regulations require if the parent and district agree to Homebased services and accommodations that an IEP be implemented prior to starting homebased services. S.C. Department of Education Regulation 43-241 permits the parent and school district to agree to a program of medical homebound services. Medical homebound service are not entitlement and a District may not agree to grant a parent's request. It is not a duty of the IEP team to start the homebound service process. To start the process a doctor must provide the parent with a certification of the medical need and reasons why the Student cannot attend class, including the period of absence and the physical capability of the child to participate in special education services and accommodations planned in light of the medical treatments to be performed. Petitioner asked about homebound services but has not obtained a doctor's certification of the need for such services. The Student's mother testified they asked members of the IEP team how to get homebound services and were not given instructions or forms to obtain the service. She testified that "When I first offered that they told me that it was between the parent, the provider, and the administrator, but I was also told by the district

that it took too long and so he wouldn't get the support before he was going to be in the hospital. So, we did not go after that avenue because we were told we were not going to get the support anyways." Testimony was offered that "[The mother] has brought up the question about going that route, and it has been shared with you guys that has to be initiated from the parent level and had that been initiated, I could have absolutely supported that." The testimony in this hearing leads me to believe that District did not obstruct the Parents from obtaining a homebound medical certification from Student's attending doctors. Because no doctor's certification was presented to the District, I find the IDEA Regulations were not violated.

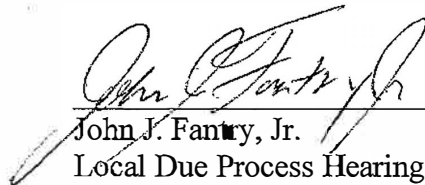
4. The Parents allege the goals, curriculum and modifications expressed in the June 5, 2019, IEP proposed for the Student are not suitable to meet his needs. The Due Process Hearing Request (HO Exhibit 1) and the Student's mother's testimony reflects she and the Student's father feel Montessori Teaching and Materials is a better methodology for educating the Student. The Parents disagree with the MAP results that show the Student as functioning two to three years below his grade level and the Student is making little to no progress toward the 2018 IEP goals for math, reading, writing, daily living skills, socialization, communication, and speech and language. The Parents insist the Student have a "specified one-on-one assistant," the most restrictive environment to supplement the goals of the proposed 2019 IEP. The Parents did not provide expert witnesses to address the alleged errors in the 2019 IEP, with the exception of their BCBA, who challenged the FBA and BIP incorporated into the IEP. The Parents' BCBA, who was previously involved in the Student's IEP development, ended her services for the family in October of 2018. She has not in her professional capacity attended any of the

Student's IEP meetings in 2019 or inspected the 2019 IEP for the purposes of rendering an opinion as to whether the 2019 IEP provided the Student with a reasonably designed IEP sufficient to offer the Student meaningful educational benefits under the circumstances in the least restrictive environment. In contrast, District personnel testified that in their opinion the 2019 IEP was reasonably designed to offer the Student a meaningful educational benefit under the circumstances in the least restrictive environment. Further support of appropriateness of selecting the Autism Support Program for the Student is found within the testimony of the Student's teachers, case manager, and the school psychologist. I find that the 2019 IEP offers the Student an opportunity for meaningful educational benefit under his circumstances within the least restrictive environment.

Accordingly, and for the foregoing reasons, I find for the Respondent on all issues. ***IT IS ORDERED*** that the decision be recorded as determining that Respondent is deemed to have provided the Student through its June 5, 2019 IEP a free appropriate public education (FAPE) in the least restrictive environment (LRE).

IT IS SO ORDERED.

Winnsboro, South Carolina
July 6th, 2019e


John J. Fantry, Jr.
Local Due Process Hearing Officer

NOTICE OF APPEAL PROCESS

Should either Party wish to appeal this Ruling, they may do so by contacting the South Carolina Department of Education, Division for Exceptional Children, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.

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